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Attorneys for Defendant Cognism Inc.

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

NICHOLAS KIS, on behalf of himself and all)
 others similarly situated,)

Plaintiff(s),)

vs.)

COGNISM INC.,)
 Defendant.)

Case Number: 4:22-cv-05322-JST

The Honorable Jon S. Tigar

**JOINT CASE MANAGEMENT
 STATEMENT & [PROPOSED] ORDER**

Complaint Filed: September 20, 2022

1 The parties to the above-entitled action jointly submit this JOINT CASE
2 MANAGEMENT STATEMENT & PROPOSED ORDER pursuant to the *Standing Order for All*
3 *Judges of the Northern District of California* and Civil Local Rule 16-9.

4 **1. Jurisdiction & Service**

5 Plaintiff's Statement: As reflected in the Complaint (ECF No. 1), Plaintiff alleges this
6 Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d) (the Class Action Fairness
7 Act ("CAFA")). *See* Compl., ¶ 44.

8 Defendant's Statement: For the reasons articulated in Defendant's motion to dismiss
9 (ECF No. 24), Defendant believes that the Court lacks subject matter jurisdiction over this dispute
10 because Plaintiff lacks standing – he has suffered no legally cognizable injury and any purported
11 injury is not fairly traceable to Defendant.

12 Joint Statement: The parties are not aware of any issues regarding personal jurisdiction
13 or venue. Defendant was served on 9/22/2022.

14 **2. Facts**

15 Plaintiff's Statement: This case arises from Defendant's misappropriation of Plaintiff's
16 and Class members' names, contact information, job titles, places of work, cities of residence,
17 and other personal information to advertise paid subscriptions to their
18 websites, www.cognism.com and www.kaspr.io, without Plaintiff's and Class members' consent.
19 Compl., ¶¶1-3. Cognism advertises subscriptions primarily to salespeople and marketers by
20 publicly displaying profiles of the Plaintiff and Class Members showing their names, contact
21 information, and other personal information to users on a free trial basis. *Id.* ¶¶4-7. Cognism gives
22 trial users the ability to view and download profiles for a limited amount of time and, after that
23 limit is reached, trial users who attempts to view or download additional Plaintiff or Class
24 Member profiles receive messages prompting them to purchase a paid subscription that provides
25 a variety of advertised services, such as "Intent data" about "business web user's observed
26 behavior – specifically web content consumption – that provides insight into their interests."
27 Cognism promises to inform the subscriber which "articles and reviews" the prospect has read,
28

1 which “whitepapers” the prospect has downloaded, and what “websites” the prospect has visited.
2 Id. ¶15-17. Defendant is the sole author, designer, and implementor of these advertising
3 techniques and messages. Id. at ¶32. Plaintiff did not give his consent for Cognism to use his
4 name and persona to advertise subscriptions to its website. Id. at ¶¶37. Additional facts supporting
5 Plaintiff’s causes of action are in the Complaint.

6 There are many common facts, including: whether Cognism knowingly uses the names,
7 personal information, and personas of Plaintiff and the Class to advertise website subscriptions;
8 whether Cognism displays or displayed the Plaintiff’s name, personal information, and persona
9 on its website; whether Cognism asked for, or received, consent from, or provided compensation
10 to, Plaintiff and the Class for the use of their names, personal information, and personas; and
11 whether and how Cognism has benefited from its use of Plaintiff’s and the Class’s names,
12 personal information, and personas.

13 Defendant’s Statement: Cognism is a sales lead generation platform that helps companies
14 connect with potential customers. To facilitate such connections, Cognism collects information
15 about business professionals, such as their employer, job title, office location, and contact
16 information.

17 Cognism’s aggregated database of verified information about business professionals is
18 available through Cognism’s platform, which allows an individual to search by various criteria to
19 identify potential sales leads. Cognism allows potential customers the opportunity to try its
20 platform through a free trial, which permits the trial user to use the full platform for a limited
21 period of time or for a limited number of contact information downloads.

22 Information concerning Plaintiff was obtained by Cognism from third-party data sellers.
23 That information is contained within the Cognism platform. Although Plaintiff asserts that
24 “Cognism displays a profile of personal information about Mr. Kis on www.cognism.com, which
25 Cognism intends to be used by B2B marketers and salespeople who wish to contact Mr. Kis with
26 unsolicited promotions,” Compl. ¶ 59, the only way Plaintiff’s information could possibly appear
27 to any user of Cognism’s platform would be when the platform itself was actually used --
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1 Plaintiff's name and information were never listed on Cognism's public-facing website, and never
2 used in any promotional material or advertisement.

3 In fact, the only time Plaintiff's information was ever accessed on the Cognism platform
4 was when Plaintiff's own attorney misrepresented himself as a potential Cognism customer to
5 gain access to the Cognism platform, and then did his own search for Mr. Kis. On that basis,
6 Plaintiff advances statutory right-of-publicity and California common law misappropriation
7 claims. Plaintiff also advances a CIPA claim based on his assertion that information about
8 Plaintiff was obtained by Cognism through wire interception of emails. This never occurred.

9 **3. Legal Issues**

10 The principal legal issues are: (1) whether Plaintiff has satisfied his burden of alleging a
11 legally cognizable injury-in-fact that is fairly traceable to Defendant's conduct for purposes of
12 Article III standing; (2) whether Plaintiff states claims under California's Right of Publicity
13 Statute (Cal. Civ. Code § 3344), California's Invasion of Privacy Act (Cal. Pen. Code §§ 630 *et*
14 *seq.*), California's tort of appropriation of a name or likeness, and California's Unfair
15 Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq.*); and (3) whether Plaintiff satisfies
16 the requirements for class certification pursuant to Fed. R. Civ. P. 23(b)(2) and (b)(3).

17 **4. Motions**

18 On December 12, 2022, Defendant moved to dismiss Plaintiff's claims because Plaintiff
19 does not have Article III standing and Plaintiff fails to state statutory right-of-publicity, common
20 law misappropriation, CIPA and UCL claims. ECF No. 24. Plaintiff's opposition is due January
21 27, 2023, and Defendant's reply is due February 17, 2023. The motion hearing is scheduled for
22 March 16, 2023.

23 Pursuant to Federal Rule of Civil Procedure 26(c), Defendant will seek leave to move for
24 a protective order to stay discovery pending the Court's resolution of Defendant's motion to
25 dismiss. Pursuant to Your Honor's Individual Rule L, the parties have met-and-conferred
26 regarding a limited stay of discovery and have been unable to reach a resolution through this
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28

1 process. On January 17, 2023, the parties submitted a joint letter to apprise the Court of this
2 discovery dispute.

3 **5. Amendment of Pleadings**

4 The parties reserve the right to make amendments to pleadings if and when appropriate,
5 and as permitted by court rules.

6 **6. Evidence Preservation**

7 The parties have reviewed the Guidelines Relating to the Discovery of
8 Electronically Stored Information (“ESI Guidelines”) and have met and conferred pursuant to
9 Fed. R. Civ. P. 26(f) regarding reasonable and proportionate steps taken to preserve evidence
10 relevant to the issues reasonably evident in this action. The parties have taken reasonable steps
11 to preserve discoverable information in its possession, custody, or control. The parties will
12 continue to discuss whether and to what extent any additional steps may be necessary to ensure
13 the preservation of relevant evidence.

14 **7. Disclosures**

15 The parties exchanged their initial disclosures on January 17, 2023.

16 Plaintiff’s Statement: Plaintiff disclosed information consistent with his obligations under
17 Fed R. Civ. P. 26(a)(1)(A).

18 Defendant’s Statement: Defendant disclosed the names and contact information of
19 individuals likely to have discoverable information, descriptions of documents and information
20 that may be used to support its claims or defenses, and any relevant insurance agreements pursuant
21 to Fed R. Civ. P. 26(a)(1)(A).

22 **8. Discovery (and Discovery Plan Pursuant to Fed R. Civ. P. 26(f)(2) and 26(f)(3))**

23 Joint Statement: The parties held their Rule 26(f) conference on January 3, 2023. Initial
24 disclosures were served on January 17, 2023, without any modifications to the timing, form, or
25 requirement of the initial disclosures. No additional discovery has been taken to date.

26 The parties agree that a protective order governing the use of confidential business
27 information and other confidential material and a Rule 502(d) order to protect against the waiver
28

1 of privilege are appropriate in this case. The parties intend to jointly submit to the Court for
2 approval a protective order based on the Northern District of California's model order, modified
3 as necessary to account for the particular confidentiality concerns in this case. The parties also
4 intend to jointly submit to the Court for approval an order regarding the discovery of
5 electronically stored information based on the Northern District of California's model order,
6 modified as necessary to account for the particular discovery concerns in this case.

7 At this time, the parties do not propose any limitations or modifications of the discovery
8 rules other than as stated above and below regarding Defendant's intention to seek a stay of
9 discovery at this time, and do not have any other concerns about the disclosure, discovery, or
10 preservation of electronically stored material. The parties do not have any issues to raise about
11 claims of privilege or of protection as trial-preparation materials.

12 Plaintiff's Statement: Plaintiff believes that discovery should proceed immediately,
13 consistent with the Federal Rules. Plaintiff proposes that fact discovery should close on February
14 15, 2024. Plaintiff anticipates seeking from Cognism and/or relevant third parties documents and
15 information concerning: (1) Defendant's use of Plaintiff's and Class members' names, personal
16 information, and personas to advertise its products; (2) Defendant's subscription models, sales
17 models, and advertising strategies; (3) The value of Plaintiff's and Class members' names,
18 personal information, and personas in attracting and retaining subscribers and/or purchasers; (4)
19 Defendant's collection of Plaintiff's and Class members' names, personal information, and
20 personas; (5) Any purported consent by Plaintiff and the Class to Defendant's use of their names,
21 personal information, and personas; (6) Defendant's revenue from its use of Plaintiff's and Class
22 members' names, personal information, and personas; (7) Any licensing agreements under which
23 Cognism either earns or pays a fee to license Plaintiff's and Class members' names, personal
24 information, and personas; (8) Defendant's insurance coverage for legal claims; (9) Internal or
25 external communications expressing or addressing privacy and/or intellectual property concerns
26 regarding Defendant's use of names, personal information, and personas; (10) The size of the
27 Class and the names of Class members; (11) Any affirmative defenses Defendant intends to assert.
28

1 Plaintiff reserves the right to seek additional categories of documents, testimony, and other
2 information as the case develops.

3 Defendant's Statement: Defendant believes that discussions concerning the anticipated
4 scope of discovery, proposed limitations or modifications to the discovery rules, and a stipulated
5 ESI and/or protective order are premature in light of Defendant's motion to dismiss the complaint,
6 as Defendant believes the resolution of the motion will substantially narrow the claims and issues
7 in this case, if the complaint is not entirely dismissed in its entirety. Defendant intends to move
8 for a protective order to stay discovery pending resolution of Defendant's motion to dismiss.

9 Notwithstanding Defendant's motion for protective order to stay discovery, Defendant
10 believes that discovery should occur in two phases upon resolution of the motion to dismiss: (1) a
11 phase of discovery limited to individual claims, followed by (2) a phase of discovery focused on
12 class claims.

13 As to Plaintiff, Defendant anticipates needing discovery on the following subjects:

- 14 • All documents and communications supporting Plaintiff's allegations in the
15 Complaint;
- 16 • All documents and communications concerning any investigation by Plaintiff or
17 Plaintiff's counsel concerning Plaintiff's allegations in the Complaint, including
18 but not limited to whether Plaintiff's name appeared on Defendant's website and
19 whether Plaintiff's information was intercepted by Defendant;
- 20 • All documents prepared by investigators or consultants for Plaintiff that are
21 relevant to any potential claims or defenses in this litigation;
- 22 • All documents and communications between Plaintiff and Plaintiff's counsel pre-
23 dating Plaintiff's retention of counsel;
- 24 • All documents and communications concerning Plaintiff's engagement of counsel
25 and the circumstances of such engagement;
- 26 • All documents and communications between Plaintiff and Defendant concerning
27 the inclusion of Plaintiff's information on Defendant's platform, including but not
28 limited to opt-out notices provided to Plaintiff;
- All documents and communications concerning Plaintiff's decision to opt out or
not to opt out of inclusion of Plaintiff's information in Defendant's platform;
- All documents and communications supporting Plaintiff's claimed damages
arising from the Complaint, including the calculation of any claimed actual
damages;

- Documents sufficient to identify Plaintiff's document retention policy/practice;
- Documents that Plaintiff contends constitute an admission on the part of Defendant with regard to the matters which are the subject of this action;
- All documents prepared by experts who Plaintiff intends to call at trial; and
- All documents that Plaintiff intends to offer at trial.

Defendant reserves the right to seek additional categories of documents, testimony, and other information as the case develops.

9. Class Actions

Plaintiff's Statement: Plaintiff provides the following information as required by Civ. L.R. 16-9(b). As alleged in the Complaint, this action is maintainable as a class action under Fed. R. Civ. P. 23(b)(2). *See* Compl., ¶88. Plaintiff contends that it is also maintainable as a class action under Fed. R. Civ. P. 23(b)(3). *Id.* Plaintiff seeks to represent the following classes:

Cognism.com class: All current and former California residents who are not subscribers of cognism.com and whose names and personal information Cognism incorporated in profiles used to promote paid subscriptions to cognism.com.

Kaspr.io class: All current and former California residents who are not subscribers of kaspr.io, who have profiles on the professional networking site LinkedIn, and whose names and personal information Kaspr used to promote paid subscriptions to kaspr.io..

Plaintiff contends that the Complaint alleges facts showing Plaintiff is entitled to maintain this action under Fed. R. Civ. P. 23. *See* Compl., at ¶¶88-97. Defendant disagrees that this action is maintainable as a class action. The parties propose that the deadline for Plaintiff's class certification motion be March 15, 2024.

Defendant's Statement: Defendant believes that class certification under Fed. R. Civ. P. 26(b)(2) or 26(b)(3) are both inappropriate in this case. There likely will be significant variations among class members with respect to the inclusion of their information on the Defendant's platform and the extent to which any individual class member's emails were collected or reviewed by Defendant such that Plaintiff will be unable to provide a common

1 method to prove impact and damages, and common issues of law and fact will not predominate.
2 A class action would thus not be a superior means for fairly and efficiently adjudicating the
3 controversy. Moreover, Plaintiff also has not suffered any legally cognizable or particularized
4 injury as his information was never displayed on Defendant's website nor were his emails ever
5 collected or reviewed by Defendant; thus, Plaintiff cannot adequately represent the putative
6 classes. To the extent there are certain common issues of law applicable to all members of the
7 putative classes, those common issues will result in dismissal of the action.

8 Counsel for Defendant has reviewed the Procedural Guidance for Class Action
9 Settlements.

10 **10. Related Cases**

11 There are no related cases.

12 **11. Relief**

13 Plaintiff's Statement: As described in the Complaint, Plaintiff, on behalf of the proposed
14 Class, seeks the following relief: statutory damages in the amount of \$750 per violation (under
15 California law on behalf of the Class); statutory damages in the amount of \$5,000 for each email
16 Cognism intercepted, eavesdropped upon, read the contents of, and/or disclosed the contents of
17 (under CIPA); Defendant's profits earned from its misuse of Plaintiff's and Class members'
18 information; compensatory damages for mental anguish; disgorgement of Defendant's unjust
19 benefits earned from its use of Plaintiff's and Class members' names, personal information, and
20 personas; an injunction prohibiting Defendant's illegal actions; nominal damages; a declaration
21 that defendant's actions are illegal; and an award of attorneys' fees and costs. *See* Compl., ¶¶88-
22 127. Because discovery has not yet begun and only Cognism has the information needed to
23 establish the size of the class, number of violations, and amount of profits earned, Plaintiff is not
24 yet able to estimate the total amount of damages sought.

25 Defendant's Statement: For the reasons articulated in Defendant's motion to dismiss
26 (ECF No. 24), Plaintiff is not entitled to any recovery, including declaratory or injunctive relief
27 and fees. Defendant seeks no relief through counterclaim but has provided Plaintiff notice to
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Plaintiff's counsel, pursuant to Rule 11, that his claims are without merit. Defendant reserves all rights, including the right to seek sanctions and fees.

12. Settlement and ADR

The parties have each filed their respective ADR Certifications pursuant to ADR L.R. 3-5(b). The parties are willing to discuss the possibility of a settlement conference before a Magistrate Judge not presiding over this action or a private mediator.

13. Other References

The parties do not believe this case is suitable for reference to binding arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

14. Narrowing of Issues

The parties do not believe there are any issues that can be narrowed by agreement or by motion at this time and do not have any suggestions to expedite the presentation of evidence at trial. The parties reserve the right to bring motions, including summary judgment motions, at the appropriate time.

15. Expedited Trial Procedure

The parties do not believe this case is suitable for expedited trial.

16. Scheduling

Plaintiff's Statement: Plaintiff proposes the following schedule:

Event	Deadline
Initial Disclosures	January 18, 2023
Completion of Fact Discovery	February 15, 2024
Plaintiff's Motion for Class Certification and Class Certification Expert Disclosures	March 15, 2024
Defendant's Opposition to Class Certification Motion and Opposing Expert reports	April 26, 2024
Plaintiff's Class Certification Motion Reply and Rebuttal Expert Reports	May 31, 2024
Opening Merits Experts Reports	30 days after an order on Plaintiff's motion for class certification
Rebuttal Merits Expert Reports	60 days after an order on Plaintiff's motion for class certification

Completion of Expert Discovery	90 days after an order on Plaintiff's motion for class certification
Dispositive Motions, including Daubert Motions	120 days after an order on Plaintiff's motion for class certification
Trial Ready Date	90 days after an order on any dispositive motions

Defendant's Statement: Defendant believes that it is premature to set a case schedule before resolution of Defendants' motion to dismiss, because the Court's decision on the motion to dismiss may significantly narrow the claims and issues in this action, which may in turn alter the scope of discovery and the need for further motion practice. Defendant suggests that the Court schedule a case management conference after the ruling on Defendants' motion to dismiss to discuss scheduling matters.

Notwithstanding Defendant's position on scheduling, Defendant proposes that the case proceed according to the following sequence of events, which contemplates phased discovery—first on Plaintiff's individual claims, followed by discovery on the class claims—to facilitate the just and efficient resolution of this action:

	<u>Deadline</u>	<u>Date</u>
	Hearing on Defendant's Motion to Dismiss	3/16/2023
	Answer / Close of Pleadings	TBD
Individual Claims	Close of Fact Discovery re: Individual Claims	TBD
	Opening Expert Reports re: Individual Claims	TBD
	Rebuttal Expert Reports re: Individual Claims	TBD
	Reply Expert Reports re: Individual Claims	TBD
	Close of Expert Discovery re: Individual Claims	TBD
	Plaintiff's Summary Judgment Opening Brief (<i>assuming parties will file cross-motions for summary judgment on individual claims</i>)	TBD
	Defendant's Summary Judgment Opening/Opposition Brief	TBD
	Plaintiff's Opposition/Reply Brief	TBD
	Defendant's Reply Brief	TBD
	Hearing On Summary Judgment Motions	TBD
Class Claims	Close of Fact Discovery re: Class Claims	TBD
	Plaintiff's Motion for Class Certification / Opening Expert Reports re: Class Claims	TBD
	Defendant's Opposition to Motion for Class Certification / Rebuttal Expert Reports re: Class Claims	TBD
	Plaintiff's Reply ISO Class Certification / Reply Expert Reports re: Class Claims	TBD
	Close of Expert Discovery re: Class Claims	TBD

	Hearing on Plaintiff's Motion for Class Certification	TBD
	Pretrial conference	TBD
	Trial	TBD

17. Trial

Joint Statement: The parties request a jury trial for all claims.

Plaintiff's Statement: Plaintiff anticipates the trial lasting fourteen days.

Defendant's Statement: Defendant cannot yet estimate the expected length of the trial because, among other reasons, it is unknown which, if any, claims will survive Defendant's motion to dismiss and whether a class will be certified.

18. Disclosure of Non-party Interested Entities or Persons

Plaintiff's Statement: Plaintiff certifies pursuant to Civil L.R. 3-15 that, to his knowledge, there are no persons or entities other than the Plaintiff and members of the proposed Class who have a financial or other kind of interest in this proceeding.

Defendant's Statement: Defendant filed its Civil Local Rule 3-15 statement on December 12, 2022. Other than the named party and Cognism Inc.'s parent corporation, there is no conflict or interest to report.

19. Professional Conduct

All attorneys of record have reviewed the Guidelines for Professional Conduct for the Northern District of California.

20. Other

The parties are not aware of any other matters that may facilitate the just, speedy, and inexpensive resolution of this matter.

1 Respectfully submitted,

2 Dated: January 17, 2023

/s/ Michael F. Ram

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26 *Counsel for Plaintiff*

Dated: January 17, 2023

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Counsel for Defendant Cognism, Inc.

CASE MANAGEMENT ORDER

The above JOINT CASE MANAGEMENT STATEMENT & PROPOSED ORDER is approved as the Case Management Order for this case and all parties shall comply with its provisions. [In addition, the Court makes the further orders stated below:]

IT IS SO ORDERED.

Dated:

Hon. Jon S. Tigar
United States District Court Judge